

**THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT OF MISSOURI**

THE STATE OF MISSOURI ex rel. ERIC
S. SCHMITT,

Plaintiff,

v.

SAM PAGE, et al.

Defendants.

No. 21SL-CC03334

**STATE OF MISSOURI’S MOTION TO RENEW
AND ENFORCE THE PRELIMINARY INJUNCTION**

The County Defendants, acting through Defendant Khan, have tried to impose exactly the same Mask Mandate that this Court has already ordered them three times not to enforce. Their fourth attempt is just as illegal as the first three, and their latest gambit appears designed to sow even greater public confusion about the legal status of their Mask Mandate. Section 67.265.5 provides that “[n]o political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section.” Yet that is exactly what the County Defendants have done. The terminated Mask Mandate is a “prohibited order” within the plain meaning of the statute, and the law prohibits the County Defendants to impose the same order all over again. Indeed, it would defeat the purpose of the statute if Dr. Khan could simply re-issue the exact same order that the County Council has lawfully terminated—which is just what he has now attempted to do. The Court should renew and enforce its prior preliminary injunction, and specifically order the County Defendants to withdraw their latest mask mandate.

FACTUAL BACKGROUND

Many underlying facts have been discussed in detail in the State’s prior briefing, which is incorporated fully by reference here. As relevant here, on July 27, 2021, the County Council voted 5-2 to lawfully terminate the July 26 Face Covering Order (the “first Mask Mandate”). This Court entered a TRO against enforcing the first Mask Mandate, and later entered a preliminary injunction against its enforcement. *See* August 3, 2021 Court Order; August 19, 2021 Court Order. The County Defendants then moved to “dissolve” the preliminary injunction based on a subsequent advisory vote of the County Council, and this Court denied their Motion, leaving the preliminary injunction in place. September 20, 2021 Court Order. The Court has now ruled three times that the first Mask Mandate is likely unlawful.

Undeterred, on September 27, 2021, the County Defendants purported to “rescind” the (already terminated) July 26 Face Covering Order, and impose a “new” Face Covering Order (the “second Mask Mandate”), with exactly the same substantive provisions. *See* Ex. A, attached, at 9-10. Just like the first one, the second Mask Mandate provides that “Face Coverings are *required* to be properly worn by all individuals ages 5 and older while in indoor and enclosed public buildings and spaces and public transportation vessels in St. Louis County. Ex. A, § III.1, at 9 (emphasis added). Just like the first one, the second Mask Mandate provides that “Face Coverings are *recommended* in indoor private settings and crowded outdoor settings where there is close contact with other people who may not be fully vaccinated.” *Id.* § III.2 (emphasis added). The second Mask Mandate also includes a list of narrow exemptions that are identical to those in the first Mask Mandate. *Id.* § III.3, at 9-10; *compare* Ex. B, at 6-7 (first Mask Mandate).

ARGUMENT

As noted in the State’s prior briefs, which are incorporated fully by reference, “[w]hen considering a motion for a preliminary injunction,” Missouri courts “should weigh ‘[1] the movant’s probability of success on the merits, [2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and [4] the public interest.’” *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (quoting *Pottgen v. Missouri State High Sch. Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994)). These factors favor the State.

I. The New Mask Mandate Is Unlawful Under § 67.265.

Missouri remains likely to succeed on the merits because the second Mask Mandate remains illegal under § 67.265, for at least two reasons. First, because the first Mask Mandate was lawfully terminated on July 27, 2021, it is a “prohibited order” under § 67.265.5, and the County Defendants cannot impose a new order with the same effect, either directly or indirectly. Second, even if it had not been lawfully terminated, the first Mask Mandate would have “expired” after 30 days on August 25, and the County Defendants could not enter any similar order within the same 180-day period under § 67.265.1(1).

A. The terminated Mask Mandate is a “prohibited order” under § 67.265.5.

Section 67.265.5 provides: “No political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a *prohibited order under this section.*” § 67.265.5, RSMo (emphasis added). The first Mask Mandate was lawfully terminated by a 5-2 vote under § 67.265.2 on July 27, 2021. This Court has held that the State is likely to succeed on its claim that the July 27, 2021 vote lawfully “terminated” the first Mask Mandate.

An order that has been lawfully terminated under § 67.265.2 is a “prohibited order” within the plain meaning of § 67.265.5. To “prohibit” means “to forbid by authority or command: enjoin, interdict,” or “to prevent from doing or accomplishing something: effectively stop.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1813 (2002). Section 67.265.2 provides that “[t]he governing bodies of the political subdivisions issuing orders under this section shall at all times have the authority to *terminate* an order issued or extended under this section upon a simple majority vote of the body.” § 67.265.2 (emphasis added). As discussed in prior briefing, to “terminate” means “to end formally and definitely (as a pact, agreement, contract).” WEBSTER’S THIRD, at 2359; *see also, e.g.*, BLACK’S LAW DICTIONARY 1511 (8th ed. 2004) (defining “terminate” as “to put an end to; to bring to an end”). The termination of the July 26 Face Covering Order “forb[ade] by authority,” “prevent[ed],” and “effectively stop[ped]” the County Defendants from imposing or enforcing the terminated order. WEBSTER’S THIRD, at 1813. Orders that have been “terminated” by majority vote—like the first Mask Mandate—are thus “prohibited orders” under the plain and ordinary meaning of § 67.265.5. *Id.*

The fact that the terminated Mask Mandate is a “prohibited order” is also reflected in this Court’s prior orders entering and maintaining a TRO and preliminary injunction against its enforcement. In those orders as well, the Court “forb[ade] by authority or command,” “enjoin[ed],” “prevent[ed],” and “effectively stop[ped]” the County Defendants from enforcing the terminated Order. *See* Aug. 3, 2021 Court Order; Aug. 19, 2021 Court Order; Sept. 20, 2021 Court Order. Under this Court’s injunction, the first Mask Mandate is a “prohibited order” in the most literal sense of the words.

Furthermore, Defendants’ interpretation of the statute violates fundamental principles of statutory interpretation, in addition to contradicting the plain and ordinary meaning. As the

Supreme Court has recently emphasized, the Court should consider the immediate context of the statute and related provisions if it has any doubt about the plain meaning. *See Gross v. Parson*, 624 S.W.3d 877, 885 (Mo. banc 2021) (“[T]o determine a statute’s plain and ordinary meaning, the Court looks to a word’s usage in the context of the entire statute.”). Here, multiple provisions of the same statute are clearly designed to prevent public health officers like Dr. Khan from seeking to evade the statute’s restrictions by simply re-imposing the same orders that have terminated or expired under the statute—*i.e.*, exactly what the County Defendants have done here. *See, e.g.*, § 67.265.1(1) (providing that unapproved orders automatically expire after 30 days); *id.* (preventing the *de facto* extension of expired orders through “similar orders issued concurrently, consecutively, or successively”); *id.* (requiring successive approval of orders subject to expiration every 30 days); § 67.265.1(2) (similar restrictions on another class of orders); § 67.265.5 (prohibiting orders that have the same effect as another prohibited order). To permit the County Defendants to simply re-impose the same order after it was lawfully terminated would defeat the manifest purpose of the statute, as reflected in § 67.265.5 itself and all these provisions in its immediate context, contrary to basic principles of interpretation. *Gross*, 624 S.W.3d 885.

Because the first Mask Mandate is a “prohibited order,” Defendants’ attempt to impose the substantively identical second Mask Mandate is plainly unlawful under § 67.265.5. As noted above, under that provision, “[n]o political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section.” § 67.265.5. The second Mask Mandate purports to impose exactly the same obligations on St. Louis County residents as the first, terminated Mask Mandate did. Thus, if allowed to go into effect, it will “have the effect, directly or indirectly, of a prohibited order,” and it is illegal. *Id.*

Notably, § 67.265.5 does not apply only to the “health officer” or “executive” of the political subdivision—it applies to the entire “political subdivision.” Accordingly, the second Mask Mandate will remain unlawful even if the County Council votes to authorize or extend it.¹

B. The second Mask Mandate would be illegal under § 67.265.1(1) even if the first Mask Mandate had not been lawfully terminated.

Moreover, even if the first Mask Mandate had not been lawfully terminated on July 27 and thus become a “prohibited order,” the second Mask Mandate would still be unlawful under § 67.265.1(1). As discussed in the State’s prior briefing, even if the first Mandate had not been terminated, it would have “expired” after 30 days under § 67.265.1(1), *i.e.*, on August 25, 2021. An order that “places restrictions on ... access to” public spaces, which “expire[s]” within 30 days without an authorizing vote. *See* § 67.265.1(1), RSMo (providing that orders covered by the subdivision “shall automatically *expire* at the end of thirty days”) (emphasis added). To “expire” means to come to a formal and complete end, just like “terminate.” *See, e.g.*, WEBSTER’S THIRD, at 801 (defining “expire” as “to come to an end: cease”); BLACK’S LAW DICTIONARY, at 619 (defining “expiration” as “a coming to an end; esp., a formal termination on a closing date”). Thus, even if it had not been terminated on July 27, the Face Covering Order would have “expired”—*i.e.* “come to an end” by “a formal termination,” *see id.*—under § 67.265.1(1) on August 25. And, as discussed in prior briefing, the County Council on August 28 had no authority to “extend” an order that had “expired,” because there was nothing left to extend.

Because the first Mask Mandate “expired” after thirty days without extension—even if it had not been lawfully terminated—the County Defendants cannot lawfully re-impose the same

¹ Because § 67.265.5 applies to “political subdivisions,” it does not affect any authority that the Department of Health and Senior Services may have to impose similar requirements in St. Louis County, to the extent such authority exists. *See, e.g.*, 19 CSR 20-20.040.

order within the same 180-day period. Section 67.265.1(1) provides that an order that “places restrictions on ... access to” public places “shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day-period, *including the cumulative duration of similar orders issued concurrently, consecutively, or successively*, and shall automatically expire at the end of thirty days ... unless so authorized by a simple majority vote of the political subdivision’s governing body to extend such order or approve a similar order.” § 67.265.1(1) (emphasis added). Because the Mask Mandate “places restrictions on ... access” to public places, it is subject to the thirty-day expiration rule and the 180-day prevention rule of this section.

As discussed in the State’s prior briefing, the first Mask Mandate “place[d] restrictions on ... access” to public places. To “restrict” means “to set bounds or limits to,” as “to check free activity, motion, progress, or departure of,” WEBSTER’S THIRD, at 1937. “Access” means “permission, liberty, or ability to enter, approach, communicate with, or pass to and from.” *Id.* at 11. By prohibiting persons without masks from entering public spaces, the first Mask Mandate purported to “set bounds or limits to” and “check free activity” of St. Louis County residents in their “liberty” and “ability to enter” public and private gathering spaces. *Id.* at 11, 1937. It falls squarely within subdivision 1(1).

Because it is an order governed by § 67.265.1(1), the Mask Mandate could only be in effect for 30 days unless it was lawfully extended by the governing body *within that 30-day period*, which it was not. § 67.265.1(1). Under subdivision 1(1), the Mask Mandate “shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day-period, *including the cumulative duration of similar orders issued concurrently, consecutively, or successively*.” *Id.* (emphasis added). The second Mask Mandate is a “similar order,” *id.*, to the first Mask Mandate, because their substantive provisions are identical. And the second Mask Mandate was issued

“consecutively” and “successively” to the first Mask Mandate. *See* WEBSTER’S THIRD, at 482 (defining “consecutive” as “following esp. in a series ... successive, sequent”); *id.* at 2282 (defining “successive” as “following in succession or serial order: following one upon another: coming in order: consecutive”). Accordingly, even if the Mask Mandate had not been lawfully terminated on July 27, it would have expired on August 25, and any attempt the County Defendants to impose a “similar” order for the next 150 days would be unlawful. § 67.265.1(1).

Finally, for all the reasons discussed above, an order that is “similar” to an expired order—such as the second Mask Mandate—is prohibited by subdivision 1(1), and thus it is also a “prohibited order” within the meaning of subsection 5. § 67.265.5, RSMo. The two provisions directly reinforce each other, and both confirm that the County Defendants’ second Mask Mandate is illegal.

II. The Other Equitable Factors Favor Maintaining and Enforcing the Preliminary Injunction.

For the reasons stated above, Defendants’ position is legally mistaken, and Missouri remains likely to succeed in its challenge to the latest instantiation of the Mask Mandate. Moreover, equity strongly favors maintaining and enforcing the same preliminary injunction against the second Mask Mandate that the Court imposed against the first Mask Mandate. Missouri incorporates its arguments on these equitable factors from its prior briefs. Most notably here, Defendants’ repeated refusal to rely on recommendations, rather than mandates, exacerbates the public confusion surrounding the legal status of the County’s Mask Mandates. As this Court noted in its TRO order of August 3, “the residents of St. Louis County are caught between the July 26, 2021 Face Covering Order and the July 27, 2021 majority vote of the St. Louis County Council to terminate the Face Covering Order,” and those residents would be “left to their own devices” to discern the law without the Court’s intervention. Aug. 3, 2021 Court Order, ¶ 2. In its August 19

Order granting the preliminary injunction, the Court restated the same concerns. Aug. 19, 2021 Court Order, ¶ 2. Likewise, on September 20, this Court refused to dissolve the preliminary injunction and instead ordered that the August 27 resolution be published by the County Defendants so that the public would be aware of the “strong recommendation for everyone to wear a mask when appropriate.” Sept. 20, 2021 Court Order, ¶ 7.

The second Mask Mandate does not purport to be a recommendation—it is a mandate. *See* Ex. A, § III.1 (“Face Coverings are *required* to be properly worn....”) (emphasis added). This language is used notwithstanding the fact that the County Defendants have represented to the Court that they do not intend to enforce the first Mask Mandate, and the Court has actively questioned why a mandate is necessary if there is no intent of enforcement. *See, e.g.*, Aug. 19, 2021 Court Order, ¶ 6 (“It is difficult to understand why the County Defendants maintain a mandate is necessary if those tasked with enforcing it have no intention to do so, invariably making a mandate merely a recommendation.”). Indeed, in their latest filings, the County Defendants continue to represent that they have no intention of enforcing their second Mask Mandate—notwithstanding its plainly mandatory terms. *See, e.g.*, Second Mot. to Dismiss, ¶¶ 10-11. This position is inherently confusing and self-contradictory—so much so, that it appears designed to generate public confusion about whether there is a mandate or recommendation in place. The Court’s Orders “allow the citizens of St. Louis County to have a clear statement as to their legal obligations and rights with regards to face coverings...” *Id.* ¶ 7. The County Defendants’ insistence on imposing an illegal *mandate*, without lawful authority and in the face of repeated Court orders to the contrary, appears deliberately calculated to generate needless public confusion among the citizens of St. Louis County about “their legal obligations and rights with regards to face

coverings.” *Id.* The Court should continue to allay this confusion by maintaining its preliminary injunction against the latest instantiation of the Face Covering Order.

CONCLUSION

For the reasons stated, the Court should renew and clarify the August 19, 2021 preliminary injunction to hold that it applies to second Mask Mandate, as well as the first Mask Mandate. The Court should also order the County Defendants to withdraw the unlawful second Mask Mandate from all of their websites, media, social media, news, and all other relevant signage, and grant such other and further relief as may be just and proper.

Dated: September 30, 2021

Respectfully submitted,

ERIC S. SCHMITT
Attorney General of Missouri

/s/ D. John Sauer
D. John Sauer, #58721MO
Jeff P. Johnson, #73249MO
Michael E. Talent, #73339MO
Missouri Attorney General’s Office
Post Office Box 899
Jefferson City, MO 65102
Tel: (573) 751-8870
Fax: (573) 751-0774
John.Sauer@ago.mo.gov
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2021, a true and correct copy of the foregoing was filed with the Court’s electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

/s/ D. John Sauer